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Supreme Court, U.S.
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No. 03-227

In The

Supreme Court of the United States

USHA VAKHARIA, M.D.

Petitioner,

v.

LITTLE COMPANY OF MARY HOSPITAL & HEALTH CARE CENTERS, et al.,

Respondents.

On Petition For Writ of Certiorari To the United States Court of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

A. Respondents' Statement of Facts Does Not Relate to the Issues To Be Decided By The Court

The Respondents' recitation of the facts (some of which have no support despite citations to the record) in essence misses the point because this case concerns the failure of the court to consider the rebuttal to that recitation. For example, the respondents state that petitioner asked to be assigned to the anesthesia department on an "as needed" basis while the district court itself held that she applied for a position in both the OB/GYN and surgical sections of the department (App 10). The surgical position was a full time position for which she was not considered. The issues of discrimination and bylaw violation revolved around whether she was classified as "as needed" or full-time. The respondents' statement of facts therefore is essentially a wish list which would not be found to exist had the petitioner's response been considered. The relevant facts, insofar as this petition is concerned, are those which bear upon whether the court properly struck that response.

B. Respondents' Justification for the "Strict" Enforcement Is In Conflict With F.R.Civ.P. 56

While the Respondents agree that "a motion for summary judgment cannot be gratned simply because the opposing party violated a local rule" they state that it is proper to strike the response "as the punishment" if there are "multiple" violations (Resp. p.18). The Respondents overlook the conflict between the "strict application" or "penalty" approach and F.R.Civ.P. 56 as explained by this court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530

U.S. 133 (2000). where this court required that a court should review all of the evidence in the record.

Under the "strict" application of Local Rule 56.1 authorized by the Seventh Circuit, the power of the district court to enact local rules pursuant to F.R.Civ.P. 83 authorizes the district court in its unbridled discretion to dispense with reviewing the entire record by striking the entire response if there are unspecified paragraphs not in conformity with the court's interpretation of local rule and to ignore genuine issues of fact, if they are not brought to the court's attention in conformity with the court's interpretation of the local rule.

This court established the principle regarding local rules in *Frazier v. Heebe*, 482 U.S. 641 (1987) holding that "A district court's discretion in promulgating local rules is not, however, without limitation. This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with 'the principles of right and justice.'" (citations).

C. The Conflict Between the Seventh Circuit And Other Circuits Is Not Explained By Respondents

The respondents seek to distinguish *United States v. Lowery, 166 F.3d 1199* (11th Cir. 1999) on the ground that it merely stands for the proposition that the Federal Rules of Evidence are unaffected by state rules of professional conduct (Resp. 18). The proffered distinction based on state versus local federal rules, however, does not withstand scrutiny. In *Lowery, Id,* 166 F.3d at 1125, the court held that even if a plea agreement ... violated a local state or district court rule, such witness's testimony could not be excluded on the basis of this rule because Federal

Rule of Evidence 402 provides that "All evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to its statutory authority."

To say that the instant case is not inconsistent with *Frazier* and *Lowery* is disingenuous at best because, by asserting a violation or violations of a local Rule 56.1, the District Court has excused itself from looking at all the facts thus effectively barring evidence which must be considered under F.R.Civ.P. 56.

The distinction which respondents offer for *John v. State of La. (Board of Trustees for State Colleges and Universities,* 757 F.2d 698 (5th Cir. 1985) is likewise nonexistent. In that case, the court held that, at a minimum, the District Court must deny a motion for summary judgment if it sees an issue of fact regardless of whether it was pointed out or not by the party opposing the motion, citing 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d §2720, at 757 F.2d at 712:

> [T]he determination whether a genuine issue concerning a material fact exists is itself a question of law that must be decided by the court. It does not depend upon whether either or both of the parties may have thought about the matter.

The court also cited with approval., 757 F.2d at 712, the case of *Keiser* v. *Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980) in which the court stated:

> [A] court can only enter a summary judgment if *everything* in the record--pleadings, depositions,

> interrogatories, affidavits, etc.--demonstrates that no genuine issue of material fact exists. Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention--the court must consider both before granting a summary judgment. (emphasis in original)

D. The Respondents Do Not Respond to Conflict Between The Circuit Courts On The Issue Of When A Response May Be Stricken

The respondent seeks to distinguish *Stough v. Mayville Community Schools*, 138 F.3d 612 (6th Cir. 1998) on the ground that it merely stands for the proposition that the district court erroneously dismissed the plaintiff's complaint automatically because she violated a local rule in responding to a motion for summary judgment. In *Stough,* the court held that the court could not dismiss the case unless it has made a specific finding of bad faith or contumacious conduct with prejudice to the moving party or there was an act tantamount to such conduct, *Id.*, 138 F.3d at 615. In most analogous situations, this court and others have followed that standard. See. e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Mulbah v. Detroit Board of Ed.ucation*, 261 F.3d 586, 591 (6th Cir. 2001).

E. To Strike An Entire Response On The Basis Of Inadmissible Evidence Is A Violation Of F.R.Civ.P. 56 And Contrary to The Practice Followed Elsewhere

Following the principle enunciated in *Lowery,* the Fifth Circuit has held that if an affidavit contains inadmissible evidence, only the inadmissible portions should be stricken

and that it is error to strike the entire affidavit, *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992). One basis for striking the response in the instant case, as stated by the district court , was that plaintiff cited "her own self-serving letters and affidavits." This holding also was clearly wrong because it constituted weighing of evidence, *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). The Court of Appeals abandoned that explanation but justified the striking of the affidavits (and everything else) on the ground that the affidavits had to be based on personal knowledge (App. 7). In terms of admissibility, the only claim respondents make is that affidavits offered in opposition to summary judgment must be on personal knowledge and set forth facts that would be admissible in evidence (Resp. 14). If the district court was wrong on what was admissible, it does more than strain credulity to believe that a decision to strike the entire response could be justified on an entirely new ground of inadmissibility. Assuming *arguendo* that there was some inadmissible testimony in the affidavits, it does not constitute a lack of good faith, and the question is whether a court may strike an entire response on some ground other than good faith.

Had the case gone to trial, any claim of inadmissible evidence would be dealt with on an individual basis as the testimony or exhibit was offered. The defendants had filed a motion to strike specific portions of the exhibits and statement of facts. Had the court ruled on this motion, it would have been possible to know what was ruled inadmissible and what was not. In this instance, the court's ruling is tantamount to granting a directed verdict motion because the plaintiff offered her own testimony or was asked to relate something which was hearsay.

F. The Respondents' Argument Regarding Specificity Lacks Specificity

Respondents defend the "strict interpretation" approach on the ground that there were "multiple" failures to be specific (Resp. 12-13).[1] At what point "multiple" failures reach the stage where they justify striking everything is not mentioned. They accept that the district court was wrong in saying that the petitioner failed to cite specific paragraphs in affidavits when in fact she had done so on all 65 occasions (Resp. 12). Respondents fail to explain, assuming there was some statement, or statements of fact, which the court found to be improperly supported by reference to "piles" of exhibits, how the striking of all of the statement of facts and exhibits is justifiable unless one takes the position that a violation of Local Rule 56.1 authorizes a departure from the usual norm of viewing all of the evidence.

G. The Content of The Memorandum Cannot Form the Basis For Striking An Entire Response

Although the respondents make much of the word "specificity," nowhere in their statement of facts or argument do they specify whether it is the petitioner's memorandum, statement of facts or response to statement of facts which was not sufficiently specific.

The district court was referring to the plaintiff's memorandum in saying that "Vakharia's memorandum ... is replete with legal and factual conclusions without any basis to support them" and "Vakharia's only use of case law is to state well-settled law without going into any analysis

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[1]Local Rule 56.1 does not specify what level of specificity in the citation to the record is required, e.g., page number, paragraph, line or specific sentence or word(s). Each district judge is free to interpret it in any manner he or she chooses.

as to how they should be applied in this instance" (App.16-17) Outside of a citation to an opinion of Learned Hand which the court did not understand (App. 17), there is no other citation specified.

There is absolutely nothing in Local Rule 56.1 relating to the content of the plaintiff's memorandum. Regardless of the standard the court would adopt, it is therefore impossible for the petitioner to be properly sanctioned for violation of the local rule when the rule did not have any provision dealing with that subject, *Amnesty America v. Town of West Harftord,* 288 F.3d 467, 471 (2nd Cir. 2002).

Respondents characterize the district court's citation of F.R.Civ.P. 12(f) as authority for striking the response as a mere "scrivener's error." (Resp. 19 fn. 7). However, in view of the district court's criticism, which focused on the Petitioner's memorandum, it may have been viewed by him as justification for striking the response of the basis of the memorandum. However, as noted in 3 *Moore's Federal Practice 3rd Ed.* §12.10(13), Rule 12(f), which deals with striking "pleadings," has no place in the context of summary judgment motions. Under F.R.Civ.P. 7(a), a "pleading" is a complaint, answer, reply to a counterclaim, cross-claim, answer to cross-claim, third party complaint or third party answer. In the Northern District of Illinois and elsewhere, it has been held that memoranda, statements of fact and affidavits filed in connection with summary judgment motions are not subject to being stricken pursuant to Rule 12 (f), *Equal Employment Opportunity Commission v. Admiral Maintenance Service,* 174 F.R.D. 643 (N.D. Ill. 1997) and cases cited therein.

Most importantly, this alleged deficiency has no place if the standard is bad faith or willfulness. If a party's response to a particular fact allegation in a statement of

fact is not sufficiently specific, the court may strike it. But to say that a court may find fault with someone's memorandum and/or certain responses to facts and then strike the entire response is to make a mockery of this court's holding regarding F.R.Civ.P. 56.

H. Timeliness Is Not A Matter On Which A "Penalty" May Be Exacted or "Bad Faith" May Be Found

In *Marshall v. Gates*, 44 F.3d 722 (9th Cir. 1995), the court held that summary judgment could not be entered simply because the party opposing the motion filed his response late. On p.18 of their brief, the respondents "take no issue" with that case. However, the respondents contend that the striking was permissible because "... Dr. Vakharia missed multiple deadlines and requested numerous extensions" (Resp. 15). This sentence implies that Vakharia missed the deadline and was late when the court struck her response. The respondents are creating a false impression by that line of argument. In the Court of Appeals Brief, p. 22 fn. 5, respondents stated "Vakharia is correct in her assertion that her third attempt to respond to the Hospital's motion for summary judgment was filed in a timely manner" and admit that District Court was in error in stating that the response was filed late .

Respondents, however, apparently are claiming that, regardless of the lack of bad faith or willfulness, the court was entitled to "penalize" the petitioner for some other, unspecified, problems in her past response and to belatedly increase the penalty to striking her entire timely response[2]

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[2]Plaintiff filed motions for extension in all instances except on one occasion, when she was eleven days late (R. 278) in November 2001, and the court fined plaintiff $2,500.00. There were no multiple violations.

I. Petitioner Cannot Be Sanctioned For Responding To Facts And Arguments Made By The Moving Party In A Summary Judgment Motion

Another of the respondents' arguments is that the district court properly struck Vakharia's third response because "Vakharia submitted a third response containing arguments the District Court has specifically excluded in prior orders" (Resp. p.15) which "intertwined argument concerned Evergreen throughout her third response, providing another reason for the District Court's decision (Pet. at App.6)." However, in their brief in opposition, the respondents devote an entire section of their Statement of Facts to "Selection of Evergreen as Exclusive Anesthesia Practice" (Resp. 4-5) , as they did in the district court in a discrimination case, asserting that the selection process was done in a nondiscriminatory manner. Nevertheless, as they see it, the District Court properly struck the petitioner's response because she cited facts and submitted evidence that the selection process was discriminatory and contrary to the by-laws to refute the respondants' claims.

Similarly, in Section 3 of the Statement of Facts of the respondants' brief in opposition, they assert that Dr. Vakharia was given a fair hearing to challenge the determination that she improperly rejected the "part-time" contract offered by Evergreen and failed to identify any violations of the Hospital's bylaws (Resp. p.5). Again, the respondants argue that the district court properly struck the petitioner's response in the district court because she rubutted their arguments and provided documentary evidence that she was full-time. [3]

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[3]It was this argument of Petitioner to which reference is made on p. 15 of Respondents' Brief where it states, "Dr. Vakharia submitted a third response ... containing arguments the District Court had specifically excluded in prior orders." Petitioner did not seek recovery on that basis.

Under Federal Rule 56 (e), (A)n adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. ..." Local Rule 56.1(b(3)(B) itself states "All material facts set forth in the statement of the moving party will be deemed admitted unless controverted by the statements of the opposing party." A party responding to summary judgment cannot be sanctioned for responding to facts and argument made by the moving party. An order proscribing such response would be contrary to F.R.Civ.P. 56.[4]

CONCLUSION

Wherefore, Petitioner, Usha Vakharia, M.D., respectfully requests this Court to grant the writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted

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[4]Respondents' claim that petitioner has waived the issue of abuse of discretion standard is also unavailing as these issues are intertwined and petitioner did present arguments on these issues on appeal.